Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RAMON HERMAN MARTINEZ
Petitioner

v.

AMERICAN OIL AND SUPPLY COMPANY
and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The petitioner seeks overthrow of Summary Judgment with prejudice and either Trial At Law by 12 jurors or assessment of damages.

1. Why did not Court(s) send required Notice of Consequences to a legally totally disabled Pro Se Litigant, as required by Federal Rule of Civil Procedure 56 in some Circuits and not here?

2. Why did the Court deprive a third set of potential attorneys entry into the case who requested reasonable extensions, pleading that Pro Se Litigant was unable physically (medically) to act in that capacity?

3. Why did District Court allow petitioner's second set of attorneys to withdraw from this case without requiring a reason as to why they were doing so, as required by Federal Rules of Appellate Procedure, Tenth Circuit Rules 46, 4(1).

PARTIES TO THE PROCEEDING

All parties to the proceeding in this Court are listed on the Cover.

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TEXT OF THE PETITION

Citations:

The District Court of the State of New Mexico dismissed case by summary judgment.

The Order and Judgment before Circuit Judge Tacha, Ebel, and Briscoe upheld Summary Judgment, 23 June 2000.

Jurisdiction:

Jurisdiction for this Court to review is upheld by fact case originated in District Court, State of New Mexico, the Court of first instance.

Constitutional Provisions; Statutes, Rules, Regulations, Canons:

Constitutional Provisions

Amendment V

...nor be deprived of life, liberty, or property, without due process of law,...

Amendment XIV

Section 1

All persons born...in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall ...abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Preamble
We the people of the United States,...establish Justice,...promote the general welfare, and secure the Blessings of Liberty and our Posterity...

Article I, Section 8 [1]
The Congress shall have the power to...provide for the...and General Welfare of the United States;...

Article IV, Section 2 [1]
The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Statutes, Rules, Regulations

42 U.S.C.A. § 1983; Federal Rules of Civil Procedure 12(b)(6), 56(c), 28 U.S.C.A.

District Court failed to give pro se civil rights plaintiff clear notice required by civil rules of need to file affidavit or other responsive materials and of consequences of default upon converting Motion to Dismiss for Failure to State Claim into Motion for Summary Judgment and give parties 30 days to submit additional materials, it did not specifically inform plaintiff of need to file affidavits and of consequences of default. C.A.11 (GA.) 1990

Federal Court committed bias, prejudice. ABA Model Code of Judicial Conduct Canon 3B(6).

Concise Statement of Case Facts Material to Consideration of Questions Presented

This is a case of severe toxic poisoning exposure to Respondents' chemical K5-16832 L2 lubricant and further mineral oil chemicals. The former is a very foul-smelling, thick lubricant for which the safety regards of OSHA were ignored by both Respondents. Facts exist that first doctor opened can in exam room and had to close room for 24 hours to remove toxic fumes and odor(s).

Respondents never told Petitioner that the chemical that he was working with, K5-16832 L2, was a toxic chemical (ingredients is on (TSCA) , see A.O.S. MSDS, attached to Lodging.

Respondents made Petitioner work in closed areas without proper ventilatory safeguards, clothing, et al. Result of exposure: multi-system involvement with permanent, totally legal injury, accepted by Social Security, 1994, ignored by company doctors obviously unaware or ignorant of the harm. Injury detected by private physicians. Court ignored letter from toxic poisoning specialists. First attorney found he couldn't handle case; second group abandoned Petitioner; third group was given serious consideration. Petitioner now having spent life savings (mortgage moneys, et al.) asked for more time. Magistrate Judge denied. Federal Judge Conway intolerant, biased, ignorant of facts clearly shown with no consequence warnings issued Summary Judgment, upheld by Tenth Circuit Judges Tacha, Ebel, Briscoe. Petitioner argued for Trial at Law by 12 jurors to decide on

merits of case presentation. Judges decided they knew more of toxic poisonings than a jury, leaving Petitioner helpless and devoid of funds after circa $60,000.00 expenditures.

Issues to be considered were raised in both Courts. Affidavits from specialists were attached. Canon violations ABA Code Judicial Conduct 2 and 3 were obviously done. Right to be heard according to law was denied. Property rights include Petitioner's body, thus becoming civil rights, ignored. Respondents argued against de novo standard and that Magistrate's Order effectively dismissed claim. Petitioner issues were raised throughout District Court's hearings and in Motion by Petitioner "Reply in Support of Objections to Magistrate's Order Denying Further Extensions," pages 1 - 5, filed May 28, 1999, attached to Lodging. Petitioner points out to Court that facts were submitted to Court that toxicity effects take 20 - 30 years to appear; now harm is established and on-going with increasing magnitude and severity. Constitutional cites not made per se [Pro Se], but the repeated pleas of Petitioner in lower Courts obviously point to repeated scope of same in latter's arguments.

Both lower courts ignored pleading by Petitioner to the effect that he could not pro se in this case because of continuing medical problems. A potential third set of attorneys who wanted to take the case voiced some concerns, as did Petitioner's doctors, Joel S. Hochman and George R. Schwartz (included are their Affidavits), attached to Lodging. This is a violation of Canon 3 B(6), ABA Code of Judicial Conduct, a clear violation of civil rights, and socioeconomic discrimination against the medically disabled, forcing them to act Pro Se against formally

trained attorneys who are physically able, and is totally wrong. Bias and discrimination are evident here.

Direct, Concise Argument Amplifying Petitioner's Reasons Relied On For Granting Of The Writ

1. Circuit Courts are at variance with the Tenth Circuit on Statutes and Rule 56. [Georgia, Florida, Tennessee, Texas, California to mention a few.] Cite: Farred v. Hicks, 915 F.2d 1530.

2. A Magistrate Judge should not take it upon himself to decide questions that should be sorted out by a jury.

3. Judge Conway's demeanor so obviously departed from the accepted and usual course of judicial proceedings that bias and prejudice is glaring.

4. It is in the Public Interest and General Welfare of the United States (Preamble; Article I, Section 8, [13] is affected. Like tobacco, the petroleum and plastic industries must be protected at all costs since at least 25% of the employed populace is slowly being poisoned. Their day has arrived. Due Process [V] and equal protection of the laws [XIV Section 1] and laws of Congress [XIV Section 5] must be ignored or hidden as here, the facts explained show with clarity.

5. As stated, Petitioner's body is his. That rights in property are a basic civil right has long been recognized and affirmed by this Court and Congress. Cite: 405 U.S. 555, Lynch v. Household Finance Corporation, 92 S. Ct. 1113, 1122 [1972].

6. As Tenth Circuit stated, page 1, Order and Judgment is not binding precedent...why discriminate against Petitioner? To protect Corporate United States?

7. Life, liberty, and pursuit of happiness are supposed to be protected [XIV, Section 1.] Equal protection under the law. Vicarious discrimination? The poor and ethnic do these jobs here, ignorant of Congress' laws. The Respondents sublimated their responsibilities here.

8. The Affidavits by prominent medical authorities support Petitioner. Yet, Judge Conway professed to be an authority on toxic substances. The judicial system in both Courts increasingly refuse to dispense justice by allowing cases to avoid going before a jury, unquestionably knowing a jury would weigh the overwhelming evidence here and rule for the Petitioner.

9. The increasing erosion of national boundaries in the drive for total global economic imperialism must not be hindered, for this case would force awakening of the populace and lead to a "clean-up"—Congressional laws and OSHA regulations would have to be observed, excluding health follow-ups and environmental evaluations.

10. Certain rights are inalienable—the right to know, the right to force powerful interests to obey Congress, the right to clean air, et al. The recent Miranda Case Decision sent a powerful message to abusive law enforcement agencies and was hailed by the population. Your Chief Justice in

recent years [paraphrased] that perhaps the Court should take a look at Stare decisis et non quieta movere and pursue justice instead.

11. This case offers this Court an opportunity to send this back for a jury trial or award significant punitive damages that will let global giants know this Court will not tolerate discrimination in destruction of health by the most blatant toxicity in violation of all humanity, numerous laws passed by Congress, and regulatory agencies such as OSHA—dispensing JUSTICE and letting all lower courts be aware that

    Honesty vivere;
    alterum non loedere;
    and
    summ cuique tribuere

    are an inalienable Maxim of Justice in this Nation again.

12. The events and facts in this case clearly show abuse of the Privileges and Immunity clause of the Constitution ruling this Court begot in 1999. Article IV: Section 8.[1] and XIV Amendment Section 1.

13. A Pro Se Litigant is discriminated against when he is held to stern requirements of an attorney's knowledge of the law, especially when the Litigant is racing to find new attorneys while handicapped by poor health conditions.

14. Motion for Summary Judgment should only be granted against a litigant without counsel (pro se) if the court gives clear notice of the need to file Affidavits and other responsive material and the

consequences of default (Fed Rules Civ. Proc. 56, 28 U.S.C.A). C.A. 11 FLA (1988) at variance.

15. C.A.7(111) 1988. When a party has obtained knowledge through the course of discovery or otherwise that a material factual dispute exists and yet proceeds to file a Motion for Summary Judgment in hopes that the opposing party will fail or be unable to meet its burden of responding to the motion, he defeats the purpose of the Summary Judgment Rule, which is to isolate factually unsupported claims. This violates rules of procedure that govern conduct of trial, specifically Rule 11, Goka v. Bobbitt, 862 F2d 646. Respondents have been well aware all along that Petitioner can prove they are in possession of many reports on Petitioner. They also have chemical reports; an Affidavit from Joel Hochman, M.D.; a letter from James Lindsey, chemist; x-rays and CT scans; and a letter from George R. Schwartz, M.D., main expert witness, indicating that Petitioner was exposed to Respondent's chemicals and that his medical problems are a result of this. All of this is enough to create controversy and show that causation can be proven. Yet, Respondents waited until the time was right, when the second attorneys withdrew, leaving Petitioner vulnerable. They sought to capitalize on this situation and made a Motion for Summary Judgment.

16. It is within the Court's discretion to enter summary judgment in favor a party opposing summary judgment, despite absence of a cross-application for such relief, where undisputed facts show that the non-moving party is entitled to such relief. SBK Catalogue Partnership v.

Orion Pictures Corp., 723 F. Supp. 1053. D.N.I. 1989. Petitioner has demonstrated beyond a shadow of doubt that he can prove causation from Respondents' chemicals if given a chance.

Petitioner pleads and prays that this Honorable Court reverse this biased, prejudicial summary judgment from lower court in favor of Respondents, and instead render summary judgment in favor of Petitioner.

Petitioner is clearly the victim of :

a. Two lawyer abandonments (not justified).

b. Bias and prejudice of lower courts

c. His inability to perform in Pro Se capacity and refusal of District Court to allow third set of lawyers to enter case. (See Reply in support of objections to Magistrate's order denying further extensions, attached to Lodging.)

d. His medical disability is the result of being exposed to Respondents' chemical K5-16832L2.

17. The Magistrate Court Judge in his order denying further extensions makes a comment that is all too familiar on page two, where in effect he states that he feels bad, that allowing extensions in this case would be prejudicial and add financial burden to AT&T; AOS AT&T is the richest corporation on earth. I believe the real prejudice is against this Petitioner, who not only is a man of modest means but has also been poisoned by Respondents' chemical and is trying hard to achieve justice with diligence and perseverance and faith in this Honorable Court that they will judge fairly. The

Magistrate did not feel same for Petitioner's predicament, brought on by two lawyer abandonments, and by his actions did not allow him a potential third set of lawyers to enter the case. They will enter the case if this summary judgment is reversed. Petitioner has shown that his civil rights have been violated by lower courts favoring the rich over the common, and seeks reversal of this Motion for Summary Judgment.

Federal Court judges ignored Federal Rules of Appellate Procedure for the Tenth Circuit, Rule 46.4(1) (on withdrawals), by allowing the law firm of Kenneth Wagner, P.C. to withdraw from this case without giving the Court a valid reason as to why they were withdrawing, as required by Tenth Circuit Rules. There is no record in Court filings or Civil Docket case no. 97-CV-523 listing of this law firm ever filing with the Court a reason as to their withdrawal. First attorney Peterson complied with this rule and filed Document [52], dated June 9, 1998. The Order of Magistrate Lorenzo F. Garcia of Conditional Withdrawal of Plaintiff's Counsel demonstrates this fact, citing financial constraint as the reason for withdrawal, included in lodging is this Document [52]. The second set of attorneys definitely did not give Federal Court a reason as to their withdrawal, as required by Rule 46.4(1).

The lower court chose to ignore this violation of Circuit Rules, thus violating A.B.A Model Code of Judicial Conduct Canon 3B.(6), citing discrimination on both disability and socioeconomic circumstances of the Petitioner. Bias and prejudice is evident by their allowing attorneys an easy out and leaving the medically disabled Petitioner in a terrible predicament, all to the advantage of the defendants.

Contrary to what has been written, this withdrawal was not by mutual consent of this Petitioner. Attorneys simply told Petitioner that they were withdrawing from the case. During this period of withdrawal, Petitioner found an expert witness that attorneys needed, George R. Schwartz, M.D., a toxicologist. Petitioner told them that he had the required expert, yet they still went ahead and withdrew.

Respondent's current favorable position is the result of bias, even without affidavits earlier on in the case. Petitioner had sent to lower courts sufficient documents to show that he had the material facts to prove causation affidavits would come later. Judges ignored Federal Rules of Civil Procedure for the Tenth Circuit Rule 56.(f) by not ordering a continuance, time for Petitioner to send affidavits to Court. Petitioner has affidavits now. Included in lodging of this appeal are several affidavits. The Judges' common sense should have alerted them, after viewing all the genuine material facts that Petitioner sent to the Court in opposing summary judgment, that indeed Petitioner could present affidavits if given a chance (continuance), but they chose to ignore Rule 56.(f).

Petitioner has been unfairly treated by the lower courts since being abandoned by the second set of attorneys and being placed in the position of *pro se* against his will. Judges' statements that they have been fair are simply not true; an example being that they gave Petitioner ten calendar days to find a new attorney and that is simply not enough time. It can take up to two weeks for a lawyer to review a client's papers after he has spent time finding a lawyer.

Petitioner is a victim twice. A victim of respondent's chemicals and of the lower court judicial system. Civil rights have been violated since Petitioner was forced to go *pro se*.

The potential third set of attorneys, Guebert and Yeomans, P.C. state in their Reply to Magistrate's Order denying further extension dated May 28, 1999, page 4 (in Lodging) that Magistrate's Order is tantamount to dismissal of plaintiff's claims. They further state that only in "extreme circumstances" where violation is due to willfulness, bad faith, or fault of the party. In Re: Exxon Valdez, 102 F. 3d 429, 432 (9th Cir. 1996); dismissal was justified here. Petitioner's fight for justice has been demonstrated beyond any doubt. He mortgaged his home to finance this case and even after two lawyer abandonments (the second one unethical and permitted by court) Petitioner is still trying to gain justice. On his own, he has filed two appeals; one with Federal Court and one with the Tenth Circuit Court of Appeals, and now is petitioning the Supreme Court of the United States for true justice to be rendered. How can this Petitioner's diligence in his quest for justice be questioned? It simply cannot. This whole case is a classic example of the Rich vs. the Common Man. So far, the lower courts have been totally inconsiderate since abandonment by the second set of lawyers, and have damaged his case by their evident bias and prejudice in favor of Corporate America (poisoners). This court can change this reversing judgment in favor of petitioner.

Many civil rights violations have occurred since the second lawyer abandonment. Instead of showing sincere consideration for the predicament of

petitioner (medically disabled on Social Security and unfamiliar with rules of law), they chose to ignore his and his doctors' pleadings for justice. Federal Judges made a feeble, insincere attempt to cover their bias and prejudice. Ten calendar days to find a lawyer, and for them to review the case, is totally unreasonable. When petitioner did find a third law firm willing to finish his case (Guebert & Yeomans, P.C.), the judges' actions in dealing with them in bad faith (denying reasonable extension deadlines) prevented them from entering the case. Letter dated 3/25/99 in Lodging shows this fact. Judges were never sincere in petitioner finding new attorneys. Federal civil rights violations were made here: forcing a medically disabled person (neurologically and physically; check doctor affidavits attached to Lodging) to represent himself *pro se*. Several rules of civil procedure were violated as well, as has been amply represented.

Because of the large amount of KS-16832L2 being used for upwards of eight hours at a time with no ventilation available, no windows in any building with communication equipment, surety the OSHA-accepted maximum level of exposure of SMG/CUMTLV-TWA was being exceeded. No protective equipment was offered such as masks, gloves, etc. Material safety data sheets (MSDS) were also not available. OSHA and the Federal "Right to Know" law requires that MSDS's be available at job sites where chemicals are being used. Petitioner did not see a MSDS until after he retired. He never had the "right to know." This is a violation of the Federal 'Right To Know" law.

Nonetheless, James D. G. Lindsay in his report (attached to Lodging) states that American Oil &

Supply Company's (manufacturer of KS16832L2) MSDS's are worthless, purposely hiding much important safety and health information from the user. This MSDS, however, does state that the chemical can contribute to pulmonary injury and all ingredients are listed in the Toxic Substance Control Act (TSCA); all are toxic. (MSDS attached to Lodging.) Also in Lodging is report by Hazard Safety Data Bank (HSDB) on the dangers of mineral oil, an ingredient of KS-16832L2, composition 44%.

All those persons that have worked with the KS-16832L2 in the past have the right to know what they were working with. Many no doubt are suffering medical health problems such as petitioner. Yet because of a long latency period (20 plus years) these persons lose track of their chemical exposure.

The Tenth Circuit Court of Appeals judges feel that the lower court judges did not err in their decisions dealing with the petitioner, quoting several citations, etc. The fact of the matter is that the lower court judges showed a total disregard for the condition of the petitioner and the circumstances that brought him to this predicament. They did not consider the following:

1. That petitioner has been unethically abandoned by his second set of attorneys, violating Tenth Circuit rules on withdrawal (46.4(1)).

2. Untrained in the law, this *pro se* litigant is forced to stay in that position by refusal of Federal Court judges to allow Guibert & Yeomans entry into the case.

3. The judges totally disregarded the fact that they were dealing with a legally medically disabled person (physical, neurological). See Dr. Joel S. Hochman's affidavits attached in Lodging; also the affidavits of Dr. George R. Schwartz and Allan Lenetsky, M.D.

It is absurd to believe that any judge bent on rendering true justice would not consider all of the foregoing. A judge's function is to render judgment, not block justice. The judges demonstrated the worst kind of bias and prejudice here, showing no consideration for this petitioner's condition. Most federal circuits show this consideration when dealing with *pro se* litigants; none was shown by lower courts.

Consider the following N.D. 111.1995. On Motion for Summary Judgment, *pro se* litigants are not held to the same stringent standards as formally trained attorneys, their pleadings are to be liberally construed. Goeder v. Godinez, 375 F. Supp. 1334. Obviously, consideration is suggested here.

In opposing the Motion for Summary Judgment, petitioner sent the federal judge a mountain of documents to back up his claim of causation (material facts). Most of them are in the Lodging of Appeal and then more that are not included in this Lodging would be too voluminous. Included were Dr. Joel S. Hochman's affidavit and expert witness on toxicology Dr. George R. Schwartz's letter dated December 21, 1998 showing that he could be petitioner's expert witness. The judge should have realized that with reports such as these, the affidavits that he required would come later. He chose not to comply with Rule 56(f) on continuance to produce affidavits, and also

Rule 56(e) which allows for other types of material facts to be sent in opposing summary judgment (example material in Lodging). The judge decided to ignore violating Federal Rules of Civil Procedure. Lower court judges are not chemical or medical experts and should allow petitioner's doctors and expert chemist to testify in a court of law.

Money and influence should never be the reason as to whether a litigant receives justice or not. Such has been the case here. Lower court judges protecting corporate America, corporate poisoners. This should never be the case in American jurisprudence. The Pledge of Allegiance states "...and justice for all."

Lower court judges made feeble attempts to justify summary judgment for respondent. In doing this they used empty statements and half-truths that hide the real truth. Petitioner was even denied a Request for Hearing where the truth could have been explained thoroughly.

Federal court judges did not care that Petitioner was legally medically disabled and could not perform as *pro se* and denied a third set of attorneys entry into the case. Petitioner's doctors' affidavits showing this problem, and their opposition to the petitioner acting *pro se*, was not considered. This is a violation of ABA Model Code of Judicial Cannon 3B.(6), discrimination against the medically disabled. In this case, forcing a legally disabled litigant to fight his case against all odds. (See Dr. Hochman's affidavit dated July 27, 200; Hochman's other affidavit dated August 19, 1998; and George R. Schwartz's affidavit dated July 30, 1999.) All are undeniable proof of medical condition of petitioner and their advice that he was not capable of acting *pro se*. Judges ignored all this.

This affidavit could have been presented earlier if Judge Conway would have allowed a continuance in this case, as required by Federal Rule of Civil Procedure 56(f). Also ignored was Federal Rule of Civil Procedure 56(e). The Judge's actions here were in violation of Canon Law 2-3, violating 3B(6), civil rights of petitioner, who has struggled throughout this case against many odds.

Lower court judges definitely violated civil rights of petitioner throughout, refusing to work with him in good faith since the second lawyer abandonment. He not only was battling opposing respondent lawyers, but also federal court judges bent on dismissing his case once he was put in this horrible predicament, not considering his medical condition or his unfamiliarity with legal rules as he is not a formally trained attorney.

There were more than enough genuine material facts in the Lodging sent to Judge Conway in opposing summary judgment. A prudent mind dedicated to justice should easily see this (note this Lodging). More documents than are in this Lodging were sent to Judge Conway. If all of this information used by petitioner to prove causation and sent to Judge Conway was not enough, he should have ordered a continuance to produce more affidavits. Rule 56(e).

Is the Tenth Circuit at such a variance with other circuits that allow special consideration to *pro se* litigants? How much more consideration would they show to a medically disabled litigant? Lower court judges chose not to have consideration and instead violated the civil rights of petitioner.

No one is above the law. Let justice prevail.

Both lower courts denied petitioner an oral hearing. A hearing would be justified here under Canon 3B.(1).

WHEREFORE, Petitioner prays that this most honorable court reverse this biased Motion for Summary Judgment awarded respondents by the lower court. This will allow a potential third set of attorneys to enter this case as indicated by their letters to the Court.

OR, on behalf of petitioner, that this court reverse this biased order and without cross-application reverse summary judgment in favor of the petitioner. This would be justified in view of civil rights violations committed by the lower courts. Additionally, award damages to petitioner brought about by respondents' chemicals that can be demonstrated by the attached medical reports (attached to Lodging).

Respectfully submitted:
"without prejudice UCC 1-207"

Ramon Herman Martinez, Petitioner

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APPENDIX

A. United States Court of Appeals for the Tenth Circuit, Order and Judgment before **TACHA**, **EBEL**, and **BRISCOE**, Circuit Judges filed document: None

B. U.S. District Court, District of New Mexico Memorandum Opinion and Order by Chief Judge John E. Conway overruling Plaintiff's objections to Magistrate Judge's order denying further extensions [92] and granting defendant's motion for summary judgment [98] filed document: 104, June 28, 1999.

U.S. District Court District of New Mexico Order by Magistrate Judge Lorenzo F. Garcia denying further extensions filed document: 91, April 16, 1999.

U.S. District Court, District of New Mexico Order by Magistrate Lorenzo F. Garcia of conditional withdrawal of plaintiff's counsel and extension of case management deadlines. Document: 52 filed June 9, 1998.

Filed June 23, 2000
No Document Number

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAMON H. MARTINEZ, Plaintiff-Appellant, v. AMERICAN OIL AND SUPPLY COMPANY and AMERICAN TELEPHONE & TELEGRAPH COMPANY, Defendants-Appellees	No. 99-2228 (D.C. No. CIV-97-523-JC) (D. N.M.)

ORDER AND JUDGMENT*

Before **TACHA**, **EBEL**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Security Act (ERISA), all arising out of injuries he alleged were caused by his use of lubricant KS168321-2 while employed by AT&T. Plaintiff amended his complaint in March 1998, deleting his ERISA claim and dropping some defendants. Soon after plaintiff's deposition was taken in June 1998, plaintiffs first attorney withdrew, citing financial considerations. The magistrate judge assigned to preside over discovery matters extended the case management and discovery deadlines, and shortly thereafter, a second attorney entered an appearance on plaintiff's behalf. This second attorney, however, withdrew in December 1998.

Plaintiff, now appearing *pro se*, was given additional extensions of the case management and discovery deadlines by the magistrate judge, based on plaintiff's assurances that entry of new counsel was imminent. On April 16, 1999, after no new counsel had made an appearance on plaintiff s behalf, the magistrate judge denied plaintiffs request for a further extension of the deadline for disclosure of plaintiffs expert witnesses and other case management deadlines. The magistrate judge noted in his order that plaintiffs complaint had been pending for two years; that he had extended the case management and discovery deadlines at plaintiff's request on three prior occasions; and that he had granted plaintiff four extensions of time to designate his expert witnesses and to produce expert reports in accordance with Fed. R. Civ. P. 26. The magistrate judge further noted that

On June 28, 1999, the district court granted defendant's motion for summary judgment, finding that plaintiff had failed to submit any evidence that created a genuine issue establishing the requisite causation. The district court ruled that neither Dr. Schwartz's letter nor Mr. Lindsay's statement provided the factual basis for their stated opinions nor established that they were competent to testify as to the matters stated in their submissions; that the list of photocopied publications was insufficient to

establish causation; and that "none of the complete excerpts suggest[ed] a tie" between pulmonary fibrosis and plaintiffs exposure to the KS I 6832L2 lubricant. R. Vol. 111, Doc. 104 at 3-4.

DISCUSSION

Plaintiff argues that the magistrate judge erred in refusing to extend the time allowed for expert witness discovery. We review discovery rulings for Man abuse of discretion. *See Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1386 (10th Cir. 1994). "[W]e will not reverse a decision to limit discovery absent a clear showing that the denial of discovery resulted in actual and substantial prejudice to the complaining litigant." *Davoll v. Webb*, 194 F.3d 1116, 1139 (10th Cir. 1999) (quotations omitted; alteration in original). We conclude the magistrate judge's decision to deny further extensions of time was not an abuse of discretion. The magistrate judge granted plaintiff numerous extensions of time

at 781 (quotation omitted). "At a minimum, the expert testimony should include a description of the method used to arrive at the level of exposure and scientific data supporting the determination. The expert's assurance that the methodology and supporting data is reliable will not suffice." *Id.* Here, we have carefully reviewed the materials submitted by the parties and the record on appeal, and we agree with the district court's determination that plaintiff s submitted materials, not in the form of affidavits, fell short of meeting this standard.

Plaintiff has submitted additional materials on appeal which are dated after the district court's order granting summary judgment. Because those materials were not presented to the district court when its ruling was made, we do not consider them. *See Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1549 n.1 (10th Cir. 1992).

We AFFIRM the district court's grant of summary judgment in favor of defendants for substantially the same reasons stated in the district court's thorough order filed June 28, 1999. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

Filed June 28, 1999 11:16
Document No. 104

US District Court
District of New Mexico
Digital File Stamp

Case:	97cv00523
Title:	Martinez v. American Oil
Document Type:	Memorandum Opinion and Order
Document Number:	104
Description:	MEMORANDUM OPINION AND ORDER by Chief Judge John E. Conway overruling Pltf's Objections to Magistrate Judge's Order Denying Further Extensions [92] and granting Defendant's Motion for Summary Judgment [98]
Total Pages:	4
Exhibits/Attachment:	0
Court Signature:	3e 82 4f f0 65 25 1b 47 64 ba c3 9a 3a d0 1e 16 d0 c5 39 df e6 0b bd a7 f3 56 eb 62 d7 d7 88 de f9 a5 97 50 ca bb e8 84 13 1e 9c 35 06 df 02 7d 80 73 24 f3 56 6b 94 3b 46 dc ae c2 1a ce 81 74

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMON HERMAN MARTINEZ,

Plaintiff.

vs. No. CIV 97-0523 JC/LFG

AMERICAN OIL ANTI) SUPPLY COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and U S WEST COMMUNICATIONS, INC.

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for consideration of Plaintiffs Objections to Magistrate Judge's Order Denying Further Extensions, filed April 26, 1999 *(Doc. 92)*. and Defendants' Motion for Summary Judgment, filed May 26, 1999 *(Doc. 98)*. The Court has reviewed the motions, the memoranda submitted by the parties, and the relevant authorities. The Court finds that Plaintiff's Objections to Magistrate Judge's Order are not well taken and will be overruled. The Court further finds that Defendants' Motion for Summary Judgment is well taken and will be granted.

1. **Objections to Magistrate Judge's Order**

Plaintiff seeks to overturn Magistrate Judge Garcia's April 16, 1999 Order denying Plaintiff s renewed motion for "extension and request to establish new case management deadlines." Order at 1 *(Doc. 91)*. Plaintiff claims Judge Garcia's Order is equivalent to a dismissal

with prejudice because without the extension Plaintiff will be unable to establish the causation element of his claim. Plaintiff contends that he did not intentionally miss the previous deadlines set by Judge Garcia and that he should be given significant leeway because he is acting *pro se*. Plaintiff also asserts that Judge Garcia's Order Should be reviewed under a *de novo* standard of review.

Defendants counter that Judge Garcia's Order is simply a non-dispositive case management order that should be reviewed under the clearly erroneous or contrary to law standard. Defendants highlight that Plaintiff has been given four previous extensions, and the case has been docketed for over two years. Defendants assert that Plaintiff's inability to establish tile essential elements arise from his failure to comply with the previous case management deadlines established by the Court and not from Judge Garcia's denial of the additional extension for expert witness discovery.

I find that this issue is non-dispositive and therefore governed by the clearly erroneous or contrary to law standard. Judge Garcia's Order did not dismiss Plaintiff's case and was not a sanction against Plaintiff. Judge Garcia's Order simply denied Plaintiff an additional extension to find an expert.

Under Federal Rule of Civil Procedure 72(a), the Court shall consider objections made by the parties and shall modify or set aside any portion of the magistrate's order found to be "clearly erroneous or contrary to law." FED. R. Civ. P. 72(a). "The clearly erroneous standard is intended to give the magistrate a free hand in managing discovery issues." R. MARCUS & E. SHERMAN, COMPLEX LITIGATION at 643 (1985). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong, it must...strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Judge Garcia's order was not clearly erroneous or contrary to law. As previously noted, this case has been pending for over two years. Plaintiff has had several deadline extensions and Judge Garcia has made every effort to accommodate Plaintiff under the rules. Consequently, Plaintiff's Objection to Magistrate's Order will be overruled.

II. **Summary Judgment**

Summary judgment is appropriate if the moving party presents evidence that shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Upon such a showing, and where the non-movant bears the burden of proof at trial, the non-movant must then come forward with specific facts; the non-movant cannot rely on the allegations contained in the pleadings alone. *Lopez v. LeMaster*, 172 F. 3d 756, 759 (10th Cir. 1999). Of course, the facts are viewed in a light most favorable to the non-moving party. *Luckett v. Bethlehem Steel Corp.*, 618 F. 2d 1373, 1377 (10th Cir. 1980).

In this case, Plaintiff cannot survive summary judgment on the causation element of his claims. Plaintiff's toxicology evidence consists of: (1) a letter from a Dr. George R. Schwartz to Plaintiff indicating that there is a causal connection between exposure to oil mist and his pulmonary problems; (2) a statement by a Mr. James Lindsey; and (3) a list of mineral oil toxicity publications. *See* Exhibits to Pl.'s Resp. and Pl's Amend. Resp. *(Docs. 100 & 101)*.

Under FED. R. Civ. P. 56(e), an affidavit must affirmatively show that the affiant is competent to testify as to the matters stated therein. No such showing has been made for either Dr. Schwartz or Mr. Lindsey. Additionally, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1984), the Supreme Court held that although the non-movant's evidence need not be in "a form admissible at

trial," the party must be able to prove the underlying facts. An expert's affidavit submitted in connection with a motion for summary judgment must state the factual basis for the opinion. Neither Dr. Schwartz' letter nor Mr. Lindsey's statement provide the required factual basis.

Plaintiff fails to submit any additional evidence that would create a genuine issue over causation. Plaintiff's submission of a photocopied list of mineral oil publications is insufficient. None of the *complete* excerpts suggest a tie between fibrosis and the oil exposure. Consequently, Defendants' Motion for Summary Judgment will be granted.

Wherefore.

IT IS HEREBY ORDERED that Plaintiff's Objections to Magistrate Judge's Order Denying Further Extensions, filed April 26, 1999 *(Doc. 92)*, are overruled.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment, filed May 26, 1999 *(Doc. 98)*, is granted.

DATED this 28th day of June, 1999.

CHIEF UNITED STATES DISTRICT JUDGE

Counsel for Plaintiff: Ramon M. Martinez, *Pro se*
Albuquerque, New Mexico

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Albuquerque, New Mexico

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US District Court
District of New Mexico
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Case:	97cvOO523
Title:	Martinez v. American Oil
Document Type:	Order
Document Number:	91
Description:	ORDER by Magistrate Judge Lorenzo F. Garcia Denying Further Extensions
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Court Signature:	61 c4 8f 3a 9b fb b0 0b cb 19 3d d0 9c c3 2a d7 c5 5e 6c 22 c0 44 aa e7 4a db 4a 68 1d cc 40 af e0 4b a5 le d9 55 cc cc 8d 12 02 2f dd 9a 92 65 e6 d4 7f cc aa 67 47 e4 e1 6d 45 fO e7 3b 80 9b

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMON H. MARTINEZ,

Plaintiff,

vs. No. CIV 97-523 JC/LFG

AMERICAN OIL AND SUPPLY COMPANY et al.,

Defendants.

ORDER DENYING FURTHER EXTENSIONS

THIS MATTER is before the Court on Plaintiff, Ramon H. Martinez's ("Martinez") renewed motion for extension and request to establish new case management deadlines. At present, Martinez is proceeding as a pro se litigant, but has attorneys, Guebert and Yeomans, P.C., who are willing to enter an appearance and represent Martinez should the Court agree to extend existing deadlines and establish new case management deadlines calling for new discovery, expert reports, motion practice and a new trial. This would, in effect, wipe the present case management slate clean and the Court and parties would start anew. Defendants oppose the request. (See letters dated April 12, 1999, which are made part of the court file.)

This lawsuit was filed two years ago, on April 17, 1997. Pursuant to the district's Civil Justice Expense and Delay Reduction Plan promulgated under the Civil Justice Reform Act, 28 U.S.C. 471 et seq., this case was assigned to a "standard" case management track with a target dispositional date of one year. That means that the case should have been brought to final disposition by way of settlement, motion or trial within one year from the date the issues were joined by answers.

Since then, Martinez sought and obtained numerous extensions of time to perform certain acts called for by the case management plan. For example, Martinez has been afforded four prior extensions to designate his experts and to produce expert reports in accord with the requirements of Fed. R. Civ. P. 26. He has yet to comply. On three prior occasions, the Court extended the discovery deadline and all other case management deadlines. This case was set for trial on three separate occasions, and is currently set for trial on August 16, 1999.

Martinez's proposed attorneys would be his third set since commencement of this litigation. Since withdrawal of his last set of attorneys, Martinez has not made mandatory Rule 26 expert disclosures. Depositions that were scheduled prior to the discovery deadline were vacated.

The Court sympathizes with Martinez and his predicament. Should the Court deny his request, he is faced with the onerous burden of representing himself in an upcoming trial, and, worse, not having any expert to assist him because of Martinez's failure to provide expert reports. Yet, the Court may not disregard the significant expenses already incurred by Defendants or the prejudice they would suffer by granting Martinez's most recent request.

Defendants have labored under the cloud of litigation for two years. They have complied with the Court's case management schedule, even submitting expert reports without the benefit of Martinez's expert reports. Defendants have been forced to accept delay and the concomitant legal expenses that are part of a delayed proceeding. Now, they are faced with the unpleasant and expensive prospect of starting anew as if this case was recently filed.

The prejudice to Defendants is real, not imagined. So as to comply with Court schedules, they've retained

experts; they've incurred significant costs and have now disclosed their defense theories. Should the Court allow this case to commence, as if new, Defendants' work product may well be useless or, at the very least, severely compromised.

Martinez's on-again, off-again status with various law firms has caused significant delays in the disposition of this case. It has been necessary to vacate depositions to accommodate Martinez's, new attorneys, only to have them withdraw from the litigation. The Court has repeatedly admonished Martinez about his responsibilities to comply with the rules of civil procedure, the Court's orders and directives, and the case management plan. Notwithstanding those admonitions and directives, Martinez has failed to comply. Martinez's predicament is not caused by any Defendant, yet, in seeking to extricate himself from the difficulties of pro se representation, Defendants would be forced to bear the burden of ongoing litigation, additional costs and delays. This case is more than one year past the dispositional target required by the district's Civil Justice Expense and Delay Reduction Plan. Granting the motion would result in another year's delay. That would be unconscionable. It is simply unfair to foist such a burden on the Defendants.

The Court concludes that Martinez' request to extend present deadlines and to establish new case management deadlines, calling for new discovery, expert reports and motion practice is inappropriate and is denied. The Court will allow the parties to take depositions that were scheduled within the discovery deadlines, but vacated because of Martinez's pro se status.

Lorenzo F. Garcia
United States Magistrate Judge

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Description:	ORDER by Magistrate Lorenzo F. Garcia of conditional withdrawal of Pltf's counsel and extension of case management deadlines
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Court Signature:	58 9d c3 54 6d 17 65 81 56 01 74 fb 43 b2 d3 5b 45 34 b4 29 d7 0e f3 e0 76 8b b5 3d 87 f9 5b 8b da 81 14 7f b3 b8 42 75 f3 0c 80 5c bc 67 c9 40 c6 71 74 d9 17 8b 7c df 64 65 7d 85 eb el f7 ea

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMON H. MARTINEZ,

Plaintiff,

vs. No. CIV 97-523 JC/LFG

AMERICAN OIL AND SUPPLY COMPANY et al.,

Defendants.

ORDER OF CONDITIONAL WITHDRAWAL AND EXTENSION OF CASE MANAGEMENT DEADLINES

THIS MATTER is before the Court on a conference call hearing concerning case management deadlines and a pending motion to withdraw as counsel for the Plaintiff. This case has been significantly delayed, and at the last Rule 16 conference conducted, the Court established case management deadlines so as to bring this matter to conclusion within a specified amount of time. To facilitate motion practice, the Court authorized a bifurcated deposition of the Plaintiff with the first portion being limited to preliminary issues necessary for Defendant's proposed motions to dismiss or for summary judgment. The first portion of the deposition is scheduled in late June. Completion of this deposition is necessary to allow Defendants to proceed on their proposed motion practice.

Subsequent to the Rule 16 conference, Plaintiff's counsel served a motion to withdraw. In a private conference between Plaintiff's counsel and Court, conducted with the consent of opposing counsel, the Court learned that there is no conflict of interest, lack of cooperation, or philosophical disagreement between client

and counsel on the processing of this case. Rather, the reason for the motion to withdraw is based on economic considerations concerning the costs of litigation. Under these circumstances, the Court deems it appropriate to delay the withdrawal of counsel until after completion of the first portion of the deposition scheduled for June. Plaintiff's counsel shall proceed with that deposition, and, subsequent to the completion of the deposition, will be authorized to withdraw.

In the interim, Plaintiff is directed to proceed with good-faith efforts to secure substitute counsel. In the event he does not secure substitute counsel by the date of withdrawal of present counsel, Plaintiff will be deemed to be representing himself in a pro se capacity. Plaintiff will nonetheless be obligated to comply with all rules of practice and procedure, discovery obligations, and motion practice requirements as applicable to any licensed member of the bar.

So as to minimize the expenses to Plaintiff and Defendants pending completion of the upcoming deposition, the Court will extend the expert report disclosure and report production deadline by thirty days. Similarly, the Court will extend discovery by thirty days. However, all other deadlines remain in full force and effect.

Lorenzo F. Garcia
United States Magistrate Judge